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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~525~~ 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3986

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The Brief in Opposition filed by the Government fails to meet the vital issue put before this Court by Petitioner, i.e., may a conviction be allowed to stand which is founded in part upon a coerced admission of a link in the chain of evidence needed to convict?

In seeking the courts' assistance in these post-conviction proceedings, Petitioner was mindful of this Court's statement, which, although made in connection with more revolting circumstances, should nonetheless always be applicable in cases where a conviction is founded in whole or in part upon statements wrung from the defendant under fear of punishment:

> "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."[1]

The Government urges a denial of this petition upon three grounds:

1. Waiver. This highly technical assault upon a constitutional claim totally ignores that all authorities, including the Solicitor General of the United States, believed that Petitioner had no privilege which he could assert or waive at the time of trial (Petition, pp. 13-14). It also ignores this Court's decision in *Leary* v. *United States,* 395 U.S. 6, 27-28 which held there could be no waiver of the privilege in similar circumstances. It also ignores that the record in this case is clear that a failure to raise the constitutional claim at trial was not a

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[1] *Brown* v. *Mississippi*, 297 U.S. 278, 287.

deliberate design or strategic trial choice (Petition, p. 14). This procedural defense should be no more dispositive of the case at bar than it was in *Leary*.

2. That in any event, the wagering tax returns were admissible even if the privilege had been raised and denied. This argument rests mainly upon *United States* v. *Sullivan*, 274 U.S. 259, which held that the filing of *income tax returns* was not protected by the privilege even though they may contain incriminating statements. But as Mr. Justice Brennan concurring in *Grosso* stated: (390 U.S. 72, 73):

> "*United States* v. *Sullivan, supra*, makes clear that an individual is not exempted, by the fact that he may be privileged to refuse to answer some questions, from a requirement, 'directed at the public at large,' of filing an income tax return exclusively containing questions 'neutral on their face.' *Albertson* v. *SACB*, 382 U.S. 70, 79. *Shapiro* v. *United States*, *supra*, involved a similar situation: it involved a record-keeping requirement pursuant to a neutral governmental system of price regulation.
>
> "On the other hand, we know that where the government scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, it contravenes the privilege."

This is precisely what the case at bar is all about. Both opinions in *Grosso* and *Marchetti* are instinct with the understanding that the wagering tax statutes had little to do with the revenues of the United States. These statutes were not "directed at the public at large" to secure information neutral on its face, but were directed at gamblers for the purpose of obtaining information and evidence to be used in investigating and

prosecuting gamblers. They were used for exactly those purposes in this case. This is admitted by the Government (Brief, pp. 2-3). Former Commissioner Caplin further admitted this practice when he stated that the I.R.S. used information obtained under the wagering tax statutes to prosecute gamblers for evasion of wagering taxes *and income taxes* (8 Crime & Delin., 378, noted in *Marchetti*, 390 U.S. at p. 48). To say, as the Government does (Brief, p. 5), that the wagering tax returns would have been relevant if gambling had been a lawful activity begs both the question and reality. For if gambling were lawful, there would be no wagering tax statutes, no *Marchetti* and *Grosso*, and no *Mackey* v. *United States* before this Court on this Petition.

3. Retroactivity. We again point out to this Court its recent statement in *Jenkins* v. *Delaware*, 395 U.S. 213, 221 where it is stated that a defendant may resort to available federal procedures to insure that statements admitted against him were made voluntarily. This Court has already ruled in *Marchetti* and *Grosso* that the wagering tax returns submitted by Petitioner were not voluntarily made and submitted. This self-incrimination claim is a fundamental and substantive constitutional claim at issue in this cause. This Court has always held such a claim to be subject to retroactive application (Petition, pp. 12-13).

CONCLUSION.

This Court has presently before it on petition by the Government two cases involving the scope of *Marchetti* and *Grosso; United States* v. *Knox,* No. 17, and *U.S. Coin & Currency,* No. 8. We believe that the instant Petitioner presents far more important issues concerning the use to which the Government can put statements coerced from a person through fear of legal punishment under a statute whose major if not sole purpose was to secure such statements. Petitioner does not know the number of persons convicted in Federal and State courts on evidence procured under the compulsion of the wagering tax statutes. We would think there are quite a few. A decision by this Court in the case at bar would define whether or not they were convicted in derogation of their right not to be a witness against themselves in a criminal proceeding, and would clear up this point left open by *Marchetti* and *Grosso.* We urge this Court to grant this Petition and hear this case in conjunction with those cases already before it.

Respectfully submitted,

WILLIAM M. WARD,
39 South La Salle Street,
Chicago, Illinois 60603,
ANdover 3-2180,

Attorney for Petitioner
Fred T. Mackey.